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IN THE

Supreme Court of the United States

OCTOBER TERM — 1956.

No. 131. 9

HOWARD LAWN,

Petitioner,

—*vs.*—

UNITED STATES OF AMERICA,

Respondent.

LAWN'S REPLY BRIEF

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We have transmitted to this Court Exhibits 61-A and 61-B. Physical examination thereof will show this Court that the Solicitor General mistakenly asserts in his opposing brief that "the photostats (Exs. 61-A and 61-B) have never been folded, * * *."

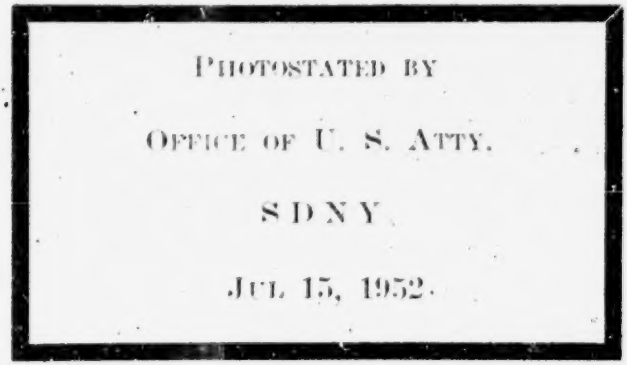
This assertion is so inapplicable to the criticism which we have asserted as to indicate that the precise nature of Lawn's contention has not heretofore been made clear.

Lawn's contention *is not* that the *Grand Jury marks* were concealed but that the exhibits were so folded and stapled as to hide from view a *stamped marking* which revealed the exhibits to be among those which should have been returned pursuant to the orders of Judges Goddard and Palmieri.

I.

EXHIBITS 61-A AND 61-B WERE FOLDED OVER AND THE FOLDS STAPLED TOGETHER SO THAT THE INSIDES WERE COVERED FROM VIEW.

On the inside of these exhibits, hidden from the viewer thereof, the following stamped marking appeared:



The opposing brief emphasizes that massive evidence "was obtained by the Government both prior and subsequent to the 1952 Grand Jury proceedings" (Br. 19). Papers so obtained prior to the Grand Jury proceedings were used before the Grand Jury by the Government and marked as Grand Jury exhibits, e.g., "G. J. Ex. —, 9 10 52 LFG."

Papers unlawfully obtained from the defendants under command of the Grand Jury were likewise marked as Grand Jury exhibits, e.g., "G. J. Ex. 2, 7 15 52, LFG."

Accordingly, the source of the papers used whether from the Government's possession or from Lawn was not determinable simply from the fact that a paper bore the Grand Jury's identification marking.

The stamp which betrayed the illegally procured papers, that is, the ones taken from Lawn's possession, was the stamped marking set forth above, that the check and check stub entry had been photostated by the office of the U. S. Attorney, S.D. N.Y., on July 15, 1952, the day on which Lawn

produced the papers and appeared before the Grand Jury. This pink stamp did not appear on exhibits legally obtained by the Government.

II.

LAWN DID NOT WAIVE HIS FUNDAMENTAL RIGHTS.

The use of tainted documents at the trial was possible only because the prosecutor failed to comply with two Court orders to return the same. Had the prosecutor returned these documents, as he was required to do, they would not have been available for use at the trial. The consequences of the prosecutor's disregard of the command of the District Court can not be visited upon Lawn. The Government cannot cast upon Lawn the burden to have ferreted out its disregard of Court orders by imposing on Lawn the duty to object on the trial and prove the foundation for such objection. Cf. *McDonald* v. *United States*, 335 U. S. 451, 456 (1948); *Mooney* v. *Holohan*, 294 U. S. 103 (1935); *People* v. *Savvides*, 1 N. Y. 2d 554 (1956).

As we have shown, the tell-tale marks which conclusively established that Exhibits 61-A and B were tainted, were hidden from view by the folding and stapling of the documents. There was no occasion on the trial to open the folds and remove the staples, placed there by the prosecutor, to examine what ostensibly would only be the blank insides of the photostats. Thus, Lawn was not on notice that the exhibits were those ruled tainted by Judge Goddard.

There was not and could not be "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U. S. 458, 463 (1938). And accordingly, there was no waiver by Lawn of his fundamental rights.*

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* If the external Grand Jury markings, referred to by the respondent, were sufficient to warn of the tainted source, as intimated by the respondent and implicit in its argument, then the prosecutor knew that he was

The Court orders to return the documents could only mean, not that the prosecutor may use the documents if no one detects this and registers objections, but that he cannot use them, period. Once a document is or should be suppressed, it is suppressed forever and for all purposes.

No verbal objection under such circumstances is necessary. The use by the prosecutor of tainted documents is a use which would "seriously affect the fairness, integrity or public representation of judicial proceedings." *United States* v. *Atkinson*, 297 U. S. 157, 160 (1936); *Olgatt* v. *United States*, 197 U. S. 207, 221, 222 (1905).

III.

THERE IS NO EVIDENCE TO SUSTAIN LAWN'S CONVICTION.

The respondent makes no attempt to point to any evidence to sustain Lawn's conviction on Counts 7 and 9 (Br. p. 27); and we submit that there is no such evidence.

As to Count 10 (the conspiracy count) the respondent contends that Lawn had knowledge of the enterprises' tax problems and probably had knowledge of some important steps in the conspiracy—(i.e.) Lawn was "present" when such steps were discussed by others (Br. p. 28).

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using tainted evidence. On the respondent's premise then, this case is precisely like one where a prosecutor knowingly uses tainted evidence to obtain a conviction, and such conviction is subject even to collateral attack whether or not there is an objection on the trial. *Mooney* v. *Holohan*, 294 U. S. 103 (1935). Moreover, the respondent's contention of waiver is premised on the "conclusion" of the Court below that untainted copies could have been substituted on the trial. This "conclusion" rests on the unsworn offer of proof made by the prosecutor on appeal—such offer could not be received by the Court of Appeals, no finding can be predicated thereon, and certainly petitioner cannot be denied the right to refute the same and to confront the witnesses with respect to that unsworn offer.

In short, Lawn stood by and watched the game with indifference. That is not enough for conspiracy. *Donovan* v. *U. S.*, 54 F. 2d 193 (3 Cir. 1932).

The respondent really seeks to sustain Lawn's conviction on Count 10 on proof only of Lawn's alleged attempts to head off prosecution, after the substantive crimes and the conspiracy were completed, and quotes testimony of what Roth in the absence of Lawn, purportedly said to Giglio subsequent to the indictments. There was no allegation in the indictments of a continuing conspiracy to thwart prosecution. Accordingly, this so-called evidence is not admissible, nor is it proof of Lawn's complicity. *Krulewitch* v. *United States*, 336 U. S. 440 (1949); *United States* v. *Rosenblum*, 176 F. 2d 321 (7 Cir. 1949), cert. den. 338 U. S. 893 (1949).

IV.

THE PROSECUTOR'S SUMMATION IS REVERSIBLE ERROR.

The mere fact that defendant's trial counsel assailed the credibility of the Government's witnesses, Roth and Lubben —confessed perjurers and criminals—did not open the door to permit the prosecutor to testify on his summation. The prosecutor may not under any circumstances make himself a non-sworn witness and support his case by his own veracity and position. No objection is necessary to such "testimony" of the prosecutor. *Berger* v. *United States*, 295 U. S. 78, 88 (1935).

The standards imposed by this Court upon prosecutors are certainly as high as the standards imposed by the Courts of the State of New York. *People* v. *Reimann*, 266 N. Y. App. Div. 505, 507 (1st Dept. 1943); *People* v. *Loccilo*, 1 N. Y. 2d 436 (1956).

In the interests of justice and in the exercise of the supervisory powers of this Court, Lawn's petition for a writ of certiorari should be granted. *Calvaresi* v. *United States*, 348 U. S. 961 (1955).

Respectfully submitted,

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